

A Guide to

CITIZEN LAW ENFORCEMENT

**Fighting Environmental
Crime at Facilities of the
U.S. Departments
of Energy and Defense**

This *FACING REALITY* report is published under the auspices of the Project for Participatory Democracy, an initiative of the Tides Center.

A Guide to Citizen Law Enforcement is the sixth in the series of *FACING REALITY* publications, preceded by:

FACING REALITY: The Future of the U.S. Nuclear Weapons Complex; a companion

Citizens' Guide to the Future of the U.S. Nuclear Weapons Complex;

Beyond the Bomb: Dismantling Nuclear Weapons and Disposing of their Radioactive Wastes;

Nuclear Weapons "CLEANUP": Prospect Without Precedent; and

Official Use ONLY: Ending the Culture of Secrecy in the U.S. Nuclear Weapons Complex.

This report focuses on the use of citizen suits to combat environmental violations at facilities of the U.S. Departments of Energy and Defense. These federal agencies have been characterized as the nation's worst environmental offenders. Much of this situation stems from the Cold War arms race, when environmental accountability took a back seat to weapons superiority. The "cleanup" of military sites is an enormous task that itself generates vast quantities of hazardous wastes that must be disposed of or contained.

The poor records of the Energy and Defense Departments in meeting their environmental responsibilities underlines the need for careful oversight and aggressive enforcement of environmental laws by watchful citizens. Federal and state regulatory agencies have been charged with enforcement, but their record, particularly that of the Justice Department, has been poor.

Direct citizen action is an essential alternative when the government does not reliably police itself. This report is an effort to help citizens understand environmental litigation and the role they can play in that process.

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I. Introduction

The Project for Participatory Democracy, in cooperation with public interest groups around the country, has published a series of papers detailing the legacy of environmental violations committed by the Department of Energy (DOE) and its contractors.¹ These booklets have argued that the United States does not need a capability for mass production of nuclear weapons, and should direct resources toward environmental responsibility instead. During the past ten years, considerable evidence has surfaced showing massive contamination at DOE sites as well as the now infamous history of human experiments and testing. By some measures, the Department of Defense has violated health and safety standards on an even larger scale, using and disposing of large quantities of metals, toxic solvents, and other materials that are dangerous to humans and the environment.²

Although the Cold War is over and massive nuclear weapons production has ended, the environmental legacy of the arms race will not simply go away. In addition to a huge backlog of wastes and contaminated sites, the dismantlement of obsolete weapons and the conversion of unneeded military bases and arms factories carry serious environmental implications. Even the "cleanup" of these sites will generate tremendous volumes of radioactive or otherwise hazardous waste to be disposed of or contained.

The environmental problems and health threats from military operations are aggravated by several factors that usually do not apply to civilian polluters:

Materials: Particularly in nuclear weapons production, forms of matter more dangerous than anything in previous human experience were created and handled in large quantities. In addition, some of these materials retain their potency for centuries, even millennia.

Secrecy: For nearly 50 years after the beginning of the Manhattan Project during World War II, the secrecy intended to stop the spread of advanced technology was also used to protect the arms industry from public scrutiny. Even now, information control is used by the government to block oversight when no legitimate national security interests are at stake.

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Unbalanced Priorities: During the Cold War, massive weapons production was seen as far more important than the consequences of radioactive and toxic by-products. Soil, air, and water were contaminated through carelessness. At numerous sites, recordkeeping was so poor that millions of dollars must now be spent to identify wastes that were stored in tanks, barrels, and holding ponds or dumped into trenches.

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Legal costs, fines, and even criminal liability of military contractors have been covered at taxpayer expense.

Excessive Optimism: Government officials and contractors often placed wastes in containers that could not be expected to last more than a few decades, under the assumption that disposal technologies would soon be developed. For much of the waste, long-term disposal is still not available.

Lack of Penalties: Significant monetary fines, not to mention more serious criminal sanctions, have rarely been imposed on polluting government agencies or their contractors. This has encouraged a low regard for regulations designed to protect health and safety. In its military activities, the government has been shielded from its own laws. That protection has been extended to contractors, whose legal costs, fines, and even criminal liability have been covered at taxpayer expense.

Absence of Federal Action: Enforcement of environmental laws is generally viewed as a task of federal or state agencies. Federal agencies responsible for prosecuting environmental violations and thus deterring illegal and damaging activities, in particular the Department of Justice (DOJ) and the Environmental Protection Agency (EPA), have usually been unable or unwilling to act against other governmental departments. Enforcement of environmental laws by the responsible federal departments against other agencies or contractors has lagged behind enforcement against private entities. While civilians have been convicted of violations involving modest quantities of hazardous wastes, federal facilities have allowed many millions of gallons of untreated wastes to sit in leaking drums and tanks or be dumped into unlined trenches or burned in open pits. With the full knowledge of government personnel, hazardous and radioactive wastes have entered air, water, and soil resources. These violations occurred due to a lack of oversight.



An exhaust stack at the Fernald, Ohio, uranium metallurgy plant. Chronic malfunctions in such systems led to the release of several hundreds of tons of uranium dust into surrounding air, land, and water. The Department of Energy has paid about \$100 million to settle lawsuits by citizens and workers, and is spending many times that figure for cleanup.

The weakness of federal self-policing puts the burden of environmental enforcement on the states and local communities. Some states have been quite effective in forcing federal agency compliance with environmental statutes. State support was crucial to passage of the Federal Facilities Compliance Act in 1992. However, not all states have been vigorous in this area, and some are hampered by inadequate funding and staff.

The absence of effective federal oversight, and lack of aggressive pursuit by many states of effective remedies to environmental crimes, particularly by the DOE and DOD, suggests the need for alternative remedies. This guide addresses the importance of citizen enforcement in identifying violations, remedying damage, and deterring future violations. By helping to train "private attorneys general," we hope to increase the likelihood of detecting environmental crimes at their origins by the people most directly affected. The potential impact of citizen action is enormous. Citizen oversight can create a national "neighborhood watch" for environmental criminal conduct, using the most powerful tool in a democracy: the educated and concerned citizen.

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II. Background

Federal agencies have long held a distinction as the worst environmental violators in the country.³ In 1991, Congress investigated the environmental record of federal agencies and found systematic violations of fundamental environmental requirements at government sites. The Congress found that "two federal agencies, the Department of Defense and the Department of Energy, together generated 20 million tons of hazardous and/or radioactive waste annually."⁴ In many cases this material was not handled or disposed of in accordance with environmental laws.

The Department of Defense

The DOD has a long history of violations, including the first environmental criminal cases against government employees. In 1990 for instance, employees of the United States Army were convicted of a series of environmental crimes committed at the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland.⁵ In 1995, the Department of Defense was accused of environmental crimes by workers at a secret Air Force base in Nevada. Some of this environmental misconduct allegedly led to fatalities among workers exposed to toxic chemicals.

The DOD oversees 25 million acres of public lands, uses more than 200 billion gallons of fresh water each year and is the steward for 9,300 threatened or endangered species at 211 bases.⁶ Left largely unregulated, the DOD and its contractors have turned parts of this vast space into a toxic and radioactive wasteland. The DOD is responsible for more than 40,000 underground waste tanks, and oversees contaminated sites in all 50 states.⁷ In 1995, the DOD reported 15,897 contaminated sites. The military lists 81 distinct sites where projected total cleanup costs exceed \$100 million each, for a total cost of more than \$21 billion. Presently, 140 current or former military facilities are listed on the National Priorities List of the country's most dangerous environmental sites.⁸ This gives the DOD the dubious distinction of being the leader among all polluters, public *and* private, in the United States.

The Department of Energy

The DOE was officially established in 1977, but its primary mission began with the Manhattan Project of the 1940s, which led to the creation of the Atomic Energy Commission (AEC) in 1947. Within its nationwide network of reactors and other facilities, the AEC's obsession with secrecy helped produce a sense of unaccountability for environmental and workplace hazards.⁹ This in turn led to some of the nation's most costly environmental hazards. The Congressional Office of Technology Assessment reported in 1991 a DOE "history of emphasizing the urgency of weapons production for national security, to the neglect of health and environmental considerations" and a lack of any "independent oversight or meaningful public scrutiny."¹⁰

The DOD and the DOE handle some of the world's most dangerous substances. Hundreds of hazardous materials ranging from arsenic to zinc cyanide are commonly found at these facilities. Among government entities, the DOE is second only to the DOD in the quantity of hazardous materials it manages, and many of its facilities are listed as the most dangerous contaminated sites on the National Priorities List.¹¹ The eventual price of managing DOE waste and contamination is expected to exceed 200 billion dollars.¹² The most dangerous materials under DOE control are nuclear weapons materials such as plutonium, and radioactive wastes from production and processing of uranium, plutonium, and tritium.

On a national scale, a review by the Office of Technological Assessment summed up this record. At DOE facilities across the country, the OTA reported that:

[C]ontamination of soil, sediments, surface water, and ground water . . . is extensive. At every facility the groundwater is contaminated with radionuclides or hazardous chemicals. Most sites in nonacid locations also have surface water contamination. Millions of cubic meters of radioactive and hazardous wastes have been buried throughout the complex, and there are few adequate records of burial site locations and contents. Contaminated soils and sediments of all categories are estimated to total billions of cubic meters.¹²

Many violations were committed by government officials and contractors who used secrecy to shield unlawful conditions. DOE contractors have included Lockheed, Rockwell International, Westinghouse, General Electric, and other major companies. Immunity agreements have protected contractors from liability.

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Past Enforcement Efforts

Environmental laws provide for full enforcement against government employees and contractors who violate them, but this enforcement has rarely happened. Despite an abundance of cases and incriminating evidence, the federal government has shown little appetite for enforcing its laws against its own employees. This failure of prosecutorial discretion is most obvious in DOE cases in which prosecutors have gone to extraordinary lengths to avoid launching criminal prosecution, even to the point of scuttling a grand jury that was intent on indictments.

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The Department of Justice (DOJ) decides whether to prosecute environmental criminal cases. Under an arrangement dating from the Reagan period, the Justice Department has centralized control over environmental criminal cases, forcing all prosecution of these violations through Washington, DC rather than leaving the authority with local prosecutors who usually make these decisions. Some analysts have suggested that the Justice Department uses its authority to hamper prosecutions of environmental violations. This allegation led to congressional hearings and some reforms in 1993 and 1994.¹⁴ The hearings revealed a pattern of underprosecution by the Justice Department's Environmental Crimes Section (ECS) and an overt hostility to efforts by local prosecutors who pursue such cases.

Long the subject of scandal during previous Administrations, the ECS often seems to function more as a corporate public defender service than as an office of independent prosecutors. Career prosecutors have alleged that high-level Justice officials repeatedly intervene on behalf of corporate officials accused of serious environmental crimes.¹⁵

Corporate Environmental Offenders

Rockwell International Corporation operated the DOE's Rocky Flats nuclear weapons plant near Denver, Colorado.¹⁵ In 1992, after a raid of the plant by the FBI, Rockwell pleaded guilty to 10 criminal counts and agreed to pay fines of more than \$18 million related to illegal storage and disposal of nuclear waste. Violations at Rocky Flats included the spraying of radioactive waste into the air as a method of disposal and the leakage of radioactive waste from holding ponds and stacks of corroding drums.¹⁶ Rockwell was able to strike a controversial plea bargain sparing company officers from individual indictments.¹⁷

Documents were uncovered in late 1995 that had been withheld from the 1992 investigation and the criminal plea bargain and that the federal government considers incriminating. This evidence shows prior knowledge by Rockwell employees of the violations at Rocky Flats. Rockwell was the subject of another federal raid at its Rocketdyne plant in Southern California after two employees were killed and another injured in a blast.¹⁸ After the raid, federal investigators found evidence that Rockwell was illegally burning hazardous wastes to avoid more expensive, lawful disposal.¹⁹ Rockwell then faced federal charges and a multi-million-dollar wrongful death claim.

EG&G is another large DOE contractor facing criminal allegations. EG&G took over Rocky Flats from Rockwell only to be replaced in turn after failing to meet federal guidelines. At another DOE site in Ohio, EG&G was sued in 1995 by workers for allegedly failing to provide protective clothing and for its intentional concealment of dangerous working conditions.²⁰ In Nevada, EG&G's workers have made similar claims in the Area 51 case in which a number of workers have died or suffered serious injuries. In this latest case, EG&G workers say they were exposed to the illegal burning of hazardous wastes in open trenches.

The Lockheed Corporation has also been linked to the Area 51 incidents in Nevada. Lockheed is alleged to have shipped barrels of hazardous wastes from its "Skunkworks" plant in Burbank, California to Area 51 for illegal disposal. Previously Lockheed was sued for exposing workers to extremely hazardous chemicals in its factory. Lockheed settled that case for a rumored \$33 million.²¹ Workers at Area 51 alleged that trucks brought some of this waste to Nevada illegally when Lockheed found itself under regulatory scrutiny in California.

National Lead of Ohio operated the DOE's Fernald plant, which processed uranium for nuclear weapons and released hundreds of tons of toxic uranium, along with other hazardous and radioactive materials into the local environment. These emissions contaminated drinking water and other resources. Citizen initiatives were the key to bringing court cases against National Lead, which finally settled suits in the amounts of \$78 million for damages to citizens and more than \$20 million for cases involving workers.

The Rocky Flats Grand Jury

Among examples of DOJ intervention, perhaps the most bizarre is Rocky Flats, a case in which a Grand Jury itself became a target for prosecution for its efforts to reveal evidence of environmental violations at the site. The Rocky Flats Plant, located near Denver, made plutonium components for nuclear weapons. Operated by the DOE and its contractor, Rockwell International Corporation, the facility had long been rumored to have serious environmental hazards. Protected by secrecy, government officials and contractors operated with impunity in releasing hazardous and radioactive wastes at the facility.

Early in its investigation, a Special Grand Jury uncovered startling evidence of contamination and criminal conduct at Rocky Flats.²² As their inquiry proceeded, however, the Grand Jury faced increasing opposition from the Justice Department. While the Grand Jury was fulfilling its responsibilities, the DOJ was secretly negotiating with Rockwell officials.

Ultimately, the Justice Department negotiated a generous plea bargain with Rockwell. The government then sealed the Grand Jury's findings and indictments from the public, burying the truth of what happened at Rocky Flats.

Under the Rocky Flats plea bargain, Rockwell was required to pay \$18.5 million from a venture that netted the corporation a \$22.4 million profit. Furthermore, the agreement permitted Rockwell to file for reimbursement of \$7.9 million from the public for fees and costs associated with the case. The agreement also protected Rockwell and its employees from any future criminal or civil charges for its activities at Rocky Flats, a concession estimated to be worth millions in possible additional fines. Finally, although most businesses are barred from future government contracts after criminal violations, the agreement allowed Rockwell to receive other, even identical, contracts from the government.²³

The most remarkable aspect of the plea bargain, however, was the absence of individual indictments. After finding more than 400 violations over an extended period, not a single Rockwell or DOE employee was indicted.

After Grand Jury members objected to the handling of the case, the DOJ threatened all 23 jurors with arrest and incarceration if they ever disclosed their findings to the public. Instead they gathered in front of the Denver courthouse and publicly called on President Clinton and Congress to help them disclose what really happened at Rocky Flats.

The DOJ responded by making them the first Grand Jury ever to be placed under FBI investigation for possible criminal charges.²⁴

Alarmed by the obvious discord between the Grand Jury and the Justice Department, Congress began a formal investigation. The congressional investigation concluded that "the most important thing that Federal prosecutors bargained away in negotiations with Rockwell was the truth," and that "the extreme conservatism and lack of aggressiveness of Justice was a major overriding factor in blocking individual and organizational indictments."²⁵ The committee also found evidence that the DOJ wanted to protect the DOE and support efforts to improve the DOE's public image. The DOJ denied there was any evidence of criminal knowledge of widespread violations on the part of officials at the plant. In late 1995, however, the DOJ conceded that documents revealed in a civil case involving Rockwell indicated that the problems were actively concealed by Rockwell.²⁶

In light of this episode and earlier history, it is not surprising that DOE and contractor officials have assumed that their actions were beyond legal accountability. Ironically, most of these congressional hearings and investigations identified a "cultural problem" at the Justice Department that treats environmental criminals differently from other types of offenders. A 1993 congressional report confirmed two earlier investigations describing this biased enforcement culture among high-level Justice officials.²⁷ The DOJ was found to have repeatedly intervened in local cases to bar or limit prosecution, particularly prosecutions of corporate officials.

This record does not offer much hope for governmental action to deter the commission of environmental crimes. In fact, the problem is exacerbated by the "Unitary Executive Theory," which the Justice Department cites to support its refusal to bring enforcement actions against other agencies. This controversial theory sees the executive branch of government as a single body, so that legal conflict among executive agencies should not occur.

In the long term, outmoded secrecy constraints and the Unitary Executive Theory must be challenged. Meanwhile, other avenues for enforcement must be strengthened. Citizen suits are among the most effective means now available.

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At the Hanford site in Washington state, open trenches such as this were used for disposal of water from plutonium operations. Radioactive and toxic contaminants in soil and groundwater pose difficult, costly cleanup dilemmas. The public was excluded from decisions at Hanford for more than 40 years.

III. The Concept of Citizen Enforcement

What is a Citizen Suit?

Most environmental statutes provide two forms of enforcement mechanism. First, Congress authorizes an entity, usually the Environmental Protection Agency, to enforce compliance with environmental statutes. Second, Congress authorizes citizens in some circumstances to enforce provisions of these acts in the absence of governmental action. This role as a citizen enforcer of federal laws has led to the term "private attorney general."

Citizen suits are permitted under the following major statutes:

- Clean Air Act²⁸
- Clean Water Act²⁹
- Endangered Species Act³⁰

- Resource Conservation and Recovery Act (RCRA)³¹
- Toxic Substances Control Act³²
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³³

These laws are often called "command and control statutes" because they directly regulate potential polluters and impose specific limits and responsibilities. In contrast, the National Environmental Policy Act of 1969 (NEPA)³⁴ does not have any direct "regulatory" function but can deter environmental abuse nonetheless. NEPA requires all federal agencies to publish an Environmental Impact Statement (EIS) prior to any major action or decision. This EIS is subject to public comment and hearings. The result is that a federal project can be stopped, modified, or delayed by citizens before threatened environmental damage occurs. NEPA is an "information forcing" law and cannot be used against existing sites.

Other statutes may impose additional restrictions. For example the Emergency Planning and Community Right-to-Know Act (EPCRA)³⁵ is relevant to DOE and DOD operations in its emphasis on tracking releases and transport of dangerous chemicals and substances, but the government has exempted its own operations from EPCRA.³⁶ In 1992, Congress enacted the Federal Facilities Compliance Act (FFCA)³⁷ to guarantee that federal facilities are subject to the same hazardous waste laws that apply to private citizens and companies.³⁸ Other statutes may provide grounds for additional claims in some cases.³⁹

Financing Citizen Suits

Citizen suits are an efficient method of enforcement for both the government and the public. Citizen litigation is supported by donations or private funding. However, if a suit is successful, the government reimburses the costs and attorneys' fees for the litigation. Even when citizens do not clearly win a case, some courts will award fees if the litigation establishes a new guideline or precedent. Since many citizens are represented by *pro bono* (donated service) attorneys or non-profit organizations, reimbursement can support additional litigation on behalf of the environment. After prevailing on a legal question, a single citizen suit can often produce more than \$100,000 in fees and costs. Lead attorneys are generally paid at \$135 per hour and associates at \$70 per hour in court-calculated fee arrangements. In the case of the Sierra Club's recent citizen suit at Rocky Flats, the Court found that roughly 170 hours spent on the case translated into \$23,125 in fees.⁴⁰

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Environmental Criminal Provisions

Environmental criminal cases can be brought under a variety of legal theories. The basic theories for environmental crime are:

1) Knowing endangerment violations: These are the most serious environmental criminal cases, in which an individual or organization displays a knowing, deliberate, or willful disregard for the law and for human safety. Due to the nature of military materials and wastes (particularly nuclear), continuing violations at government facilities are often enough to establish a basis for knowing endangerment charges.

For example, at Rocky Flats, a DOE contractor, Rockwell International Corp., pleaded guilty to criminal conduct after more than 400 violations were revealed by an FBI raid in 1989. Over the years, the head of the facility kept a diary detailing his knowledge (and that of DOE) of these activities. The knowing exposure of workers and citizens to radioactive substances satisfies the definition of placing another person at risk of serious injury.

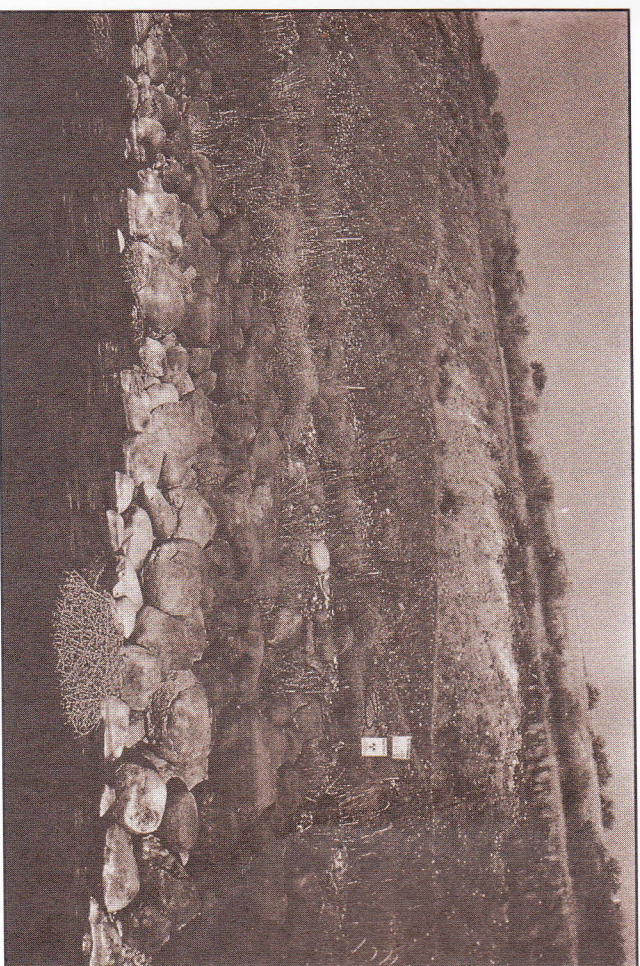
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Knowing violations of environmental laws are typically punishable by two to four years in prison per count.

2) Knowing violations: The knowing violation of federal environmental laws is more common and easier to prove than knowing endangerment. Included in this category is the knowing failure to comply with or obtain a permit.

The question here is one of general rather than specific intent. Because environmental laws concern health and safety, the courts do not require the higher standard of specific intent. Thus, to prove such cases it is not necessary to demonstrate a specific intent to commit a crime. Knowing violation provisions differ from statute to statute in their applicability and penalties, but most environmental laws view knowing violations as crimes. Such offenses are typically punishable by two to four years in prison per count.

For example, the Comprehensive Environmental Response, Compensation and Recovery Act, known as "Superfund," has three knowing violation provisions. Violations include submitting false information or failing to report a known release;⁴¹ knowing destruction or concealment of records;⁴² and failure to notify the EPA of identified facilities or sites under the Act.⁴³ Maximum penalties range from \$10,000 or one year in prison for failure to meet reporting requirements, to \$250,000 or three years in prison for failure to report releases of hazardous materials.

3) Negligent and strict liability violations: A common avenue for prosecution can be pursued outside the environmental statutes. In some cases, the government has prosecuted individuals and corporations under 18 U.S.C. Section 1001, the general fraud and false statements provision.



Radioactive tritium in the groundwater at the Hanford nuclear weapons plant spread much more rapidly than expected. Now some tritium is seeping into the Columbia River.

When individuals falsify a permit or lie to the EPA, they can sometimes be prosecuted for fraud as a separate offense. This provision allows for felony convictions and has been used in some cases.⁴⁴

4) False Statement violations: Statutes such as Superfund, RCRA, and other laws define the falsification or concealment of information about violations as a federal crime. Operations at the Hanford site in Washington State and at other DOE facilities have been found to be rife with false reports. Repeatedly, DOE employees have been accused of hiding or destroying evidence to conceal dangerous conditions. No DOE employee, however, has been jailed, fined, or even charged for such conduct.

A substantial portion of the civil enforcement of environmental laws can be attributed to citizen actions. The importance of citizen suits to criminal enforcement, however, is less commonly known. Criminal enforcement requires two elements: disclosure of criminal conduct and the political resolve to prosecute. Citizen actions can greatly assist this process by forcing the disclosure of crucial information and creating public pressure for action by the government. Our system has inadequate checks and balances on the federal agencies that are often called the "fourth branch of government." Informed citizens can function as a check on this branch of government.

Detecting Environmental Crimes

Evidence of environmental violations can take many forms. Hazardous or radioactive substances can be identified in the air, soil, or water on or near polluting sites, although it is often difficult to determine whether contamination is a result of current or historic emissions. The analysis of well water has led to the disclosure of heavy contamination at some DOE sites, for example, massive uranium emissions from the Fernald plant in Ohio. Underground reservoirs are particularly vulnerable to contamination and are seldom monitored by state authorities. In a case at Edwards Air Force Base in California, a rupture in an underground pipe in 1993 released 300,000 gallons of toxic jet fuel into a groundwater reservoir.⁴⁵

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Groundwater can carry contamination long distances. For example, at McClellan Air Force base in California, leaking underground tanks produced a "plume" of solvents that migrated for more than a mile outside the base fences.⁴⁶ In some cases of widespread contamination, pinpointing the original emission site can be difficult. In addition, the fact that pollutants have traveled long distances suggests that the contamination might have occurred long ago, perhaps decades before current environmental laws were enacted. However, the agency or corporation might still be held responsible for cleaning up the contamination or otherwise mitigating the risks it poses.

Many contaminants can cause health effects including cancer, birth defects, and immune system problems. However, proving a connection between contamination and observed health effects (using the science of epidemiology) is very difficult, partly due to incomplete information about where potentially affected people have lived and worked, and to which substances they have been exposed. These difficulties are compounded by the fact that health problems sometimes appear years or decades after exposure.

Severe contamination can cause biological signs including death or illness of fish or other wildlife, or result in areas of land that cannot support plant life, but again, such signs do not constitute proof of a particular environmental violation.

Citizen Enforcement Efforts

Citizen suits have been employed by a number of organizations. Recently the Environmental Crimes Project of George Washington University used citizen suit provisions against Area 51, a secret facility in Nevada. Other significant citizen suits include:

McClellan Ecological Seepage Situation (MESS) v. Perry.⁴⁸ In this case, MESS alleged violations of federal hazardous waste laws. The suit was ultimately barred, but the action forced the Air Force to correct violations that were largely undisputed, and allowed citizens to oversee cleanup measures.

Public Interest Research Group (PIRG) of New Jersey v. Rice.⁴⁹ PIRG alleged more than 1,000 violations of the Clean Water Act at the McGuire Air Force Base. The federal EPA and the New Jersey EPA found repeated violations. Ultimately the Air Force and the EPA agreed to a consent order requiring extensive reforms. The district court granted PIRG's summary judgment motion and awarded litigation costs and attorneys' fees.

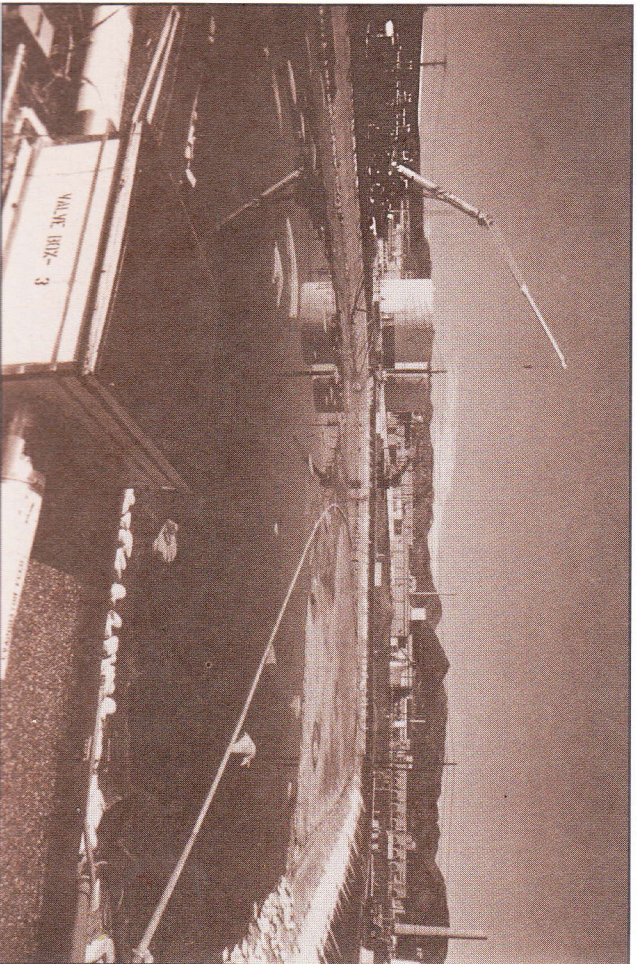
Concerned Citizens for Nuclear Safety (CCNS) v. Los Alamos National Laboratory (LANL). In mid-1995, CCNS sued LANL, site of research on the first atomic bombs and DOE's largest nuclear weapons lab, for chronic non-compliance with the Clean Air Act since 1990. At Los Alamos, 31 of 33 stacks that discharge radioactive materials had not complied with the law. Senior Judge E.L. Mechem of the U.S. District Court for New Mexico ruled in April 1996 that LANL would have 60 days to reach agreement with CCNS concerning shutdown of stacks that were in violation, as well as fines and penalties.

Chemical Weapons Working Group (CWWG) v. U.S. Army. Along with the Sierra Club and Vietnam Veterans of America Foundation, represented by the non-profit Greenlaw, Inc., CWWG sued in May 1996 to block incineration of chemical weapons at a base in Tooele, Utah. CWWG claimed that incineration would pose unacceptable health and environmental dangers, and that the Army and its contractor EG&G Defense Materials, Inc., have ignored alternative technologies for chemical weapons disposal.

IV. Developing A Citizen Suit

Initial Investigation

While physical evidence can provide clues about environmental misconduct, a paper trail is likely to provide more reliable proof of legal violations. Many environmental crimes can be found through a review of records at EPA offices or other public records (described below). Failure to have a required permit or manifest (a record or list of hazardous materials) for handling wastes is a possible criminal violation. Thus, if hazardous wastes are being stored at a facility with no record of a permit for such storage, the conduct constitutes a knowing violation of RCRA. Ignorance of the law in such cases is not a valid defense. Likewise, if large quantities of waste are seen to be burned, a formal charge of violating air quality regulations might be brought. By writing to an EPA regional office, a citizen can claim a bounty on any violation reported under the Clean Air Act that results in a prosecution.⁵⁰



Robert Del Tredici

A great deal of information supporting a court case can be revealed through citizen investigation and in the course of citizen enforcement. RCRA is a particularly useful statutory basis for investigation because of its recordkeeping requirements. Most large military sites are RCRA facilities for the storage, treatment, disposal, or transport of hazardous wastes. The generation of the equivalent of four 55-gallon drums of hazardous waste per month qualifies a facility as a "large generator" under federal law. Under the law, the EPA must have the following records or the facility is not in complete compliance.⁵¹

- personnel records and contingency plans for any generation of wastes;
- manifests, biennial reports, waste analysis or test results for any generation of wastes;
- manifests or records for the transport of any wastes;
- records that track waste transportation;
- a waste analysis plan for a treatment, storage, and disposal (TSD) facility;
- an inspection schedule for a TSD facility;
- a contingency plan specifically for a TSD facility;
- a manifest (list of materials handled) for a TSD facility;
- an operating record for a TSD facility;
- a ground-water monitoring record for a TSD facility;
- a closure plan for a TSD facility;
- a post-closure plan for a TSD facility;
- a land disposal certification for a TSD facility;
- special notification for characteristic wastes for a TSD facility; and
- facility-specific records.

Citizens should be able to review these mandatory records at EPA regional offices or by requesting them through the Freedom of Information Act. These records can indicate past violations or accidents that may form the basis of legal action. Recordkeeping errors can be the basis for a citizen suit, which in turn might uncover evidence of knowing violations of environmental laws. At the conclusion of a successful citizen suit, the evidence can be packaged and sent to the local federal prosecutor with a request for action. The key to enforcement is disclosure and the key to disclosure is investigation.

The Public Record

Well-informed citizens can use public records to demonstrate contradictions in the government's explanations of its activities. This approach is useful for countering "privilege" arguments based on confidentiality or classified information. The public record might reveal that the government openly discussed issues in the past that it now claims must be kept secret. Two kinds of public records are discussed below.

Federal Register and Federal Code: In addition to public libraries and newspaper records, one of the most important resources for citizen groups is the Federal Register. Found in most public and law school libraries, the Federal Register is the government's version of a bulletin board. The government first publishes all public notices, regulations, Executive Orders, and documents in the Federal Register.⁵²

Public Disclosure Requirements: Most environmental statutes are "information-forcing" acts, or laws that require agencies and companies to make information available to the public. For example, every federal facility must be inspected and inventoried by the EPA for hazardous wastes. This information is a public record and contains detailed descriptions about the activities, history, and hazards at a federal site.

Most information on federal facilities is kept in the ten EPA regional offices around the country. These central offices are located in Boston (Region I); New York (Region II); Philadelphia (Region III); Atlanta (Region IV); Chicago (Region V); Dallas (Region VI); Kansas City (Region VII); Denver (Region VIII); San Francisco (Region IX); and Seattle (Region X). Most state environmental agencies also have records regarding federal facilities in their jurisdiction. Citizens living near these cities can ask to review files related to nearby facilities. People in more remote locations can rely on an essential tool of the citizen investigator, the Freedom of Information Act.

Other Sources of Information

Freedom of Information Act: The Freedom of Information Act (FOIA) is the most powerful tool in a citizen's legal kit. The FOIA requires the government to supply information to the public about its activities and decisions. For example, if a DOE facility has been cited during the past year for environmental violations, the DOE must provide an account of those violations. Information on making FOIA requests can be obtained through many citizen groups and attorneys who have used it. Because requesters can be charged copying costs for long documents, citizens should negotiate or refine their requests in order to ask for particular information when a large amount of material is located. A good strategy is to request an index or summary, review the summary, then ask for more specific information.⁵³

Agencies can use a variety of tactics to make information gathering more difficult.⁵⁴ Even when the government claims exceptions or privileges, by law the agency must, within ten days, supply a list of the information withheld and the reason for withholding each item. However, the government can easily extend the time it takes to comply with a request. Obtaining information through FOIA can be a long and frustrating endeavor, but it is often worth the effort.

Interviews and Affidavits: One of the greatest uncertainties for the government in facing a citizen group is the scope of information that can be obtained from field investigations that reveal, for example, soil or water contamination. Workers at a facility also sometimes volunteer information, particularly if they can do so anonymously.

An affidavit (a written statement made or taken under oath before a witness) can transform well-documented information into part of the public record. The statement can then be used as evidence in a court case. The government often tries to have citizen suits dismissed regardless of their merits. Affidavits and other records help the court find a basis for allowing the case to go forward to formal discovery, where answers can be demanded directly from the government.

Sampling: Physical evidence can take the form of soil or water samples. Most communities have water testing laboratories. Soil samples are more difficult to analyze, but most universities have laboratories that can perform this service. Samples taken for later testing should be kept in airtight glass jars labeled by date and location. The most credible samples are submitted for testing immediately, with a documented "chain of custody" from collection to analysis.

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The government is required to supply information to the public about its activities and decisions.

Documenting Physical Evidence: Videotapes can document pollutant discharges or other damage. Verbal records can also be preserved on videotape. Even if videotape is not used in a trial, it might be essential for public or media efforts to exhibit the basis for allegations.

Citizens should ensure the credibility of video tapes or photographs by using cameras with a date and time stamp and recording: 1) the type of film and camera used; 2) the name of the site; 3) the direction from which the pictures were taken; and 4) other relevant information such as names of witnesses, the weather, and other specific observations.

Confidentiality and Whistleblower Protections:

Some of the most valuable affidavits come from insiders or "whistleblowers." Federal law protects whistleblowers from retaliation should they reveal evidence of fraud or unlawful conduct by the government. The law, however, contains an exception for national security information that, in some cases, can limit whistleblower protection. If a citizen group obtains a volunteer attorney, these matters can be addressed before completing any affidavit or statement from a whistleblower. Moreover, if the whistleblower is part of a case, attorney-client privilege might protect some of the disclosures under common law.

In the Area 51 case, workers at the secret Air Force base faced threats of prosecution if they spoke to any outside person, including a attorney, about environmental violations at the facility. Air Force security officers argued that identifying workers would violate national security laws because the Pentagon had not admitted the existence of the base.

The workers, represented by the Environmental Crimes Project, first moved to document threats made against them, using affidavits and other documents. They then submitted a rare motion to the Court: to ask that the workers' identities be sealed and fictitious names be used in the litigation. Two courts agreed and the workers were listed as "John Does" without revealing their names or positions. The Project also moved to seal all confidential sources and placed interviews within recognized attorney-client boundaries.

The Area 51 case is now on appeal, but at the trial level workers in the suit prevailed in forcing the government to acknowledge the facility's existence, comply with federal hazardous waste laws, place the site on a "docket" of facilities containing hazardous wastes, not use secrecy to subvert environmental laws, and agree that workers have rights to court access and protection from retaliation.

Further Litigation Development

Identifying Current Violations: Most environmental

statutes require that citizens allege current or past violations or those likely to recur in the future. Usually this must be shown in order to avoid a dismissal. Missing or incorrect permits are also violations under this category. Citizens are not required to prove violations but only to present a good-faith basis in law and fact at the time of filing. Usually, permit violations and other regulatory violations can be revealed through FOIA requests and a review of EPA files.

Selecting Attorneys: Once citizens have a basis for believing that violations are occurring, they should seek legal advice from a lawyer willing to volunteer time for environmental causes. Local bar offices often have lists of *pro bono* lawyers, and state Public Interest Research Groups might also be a good source. Citizens can research articles on environmental cases to find the names of *pro bono* lawyers who might be willing to pursue a new case or at least offer referrals. Many environmental laws allow attorneys to be reimbursed for fees and costs if they prevail. It is often not necessary to pay an attorney or promise to cover fees in such cases. Some attorneys, however, might require assistance to cover the costs of filing fees and paperwork.

Choosing the Optimal Target: Citizens have the privilege of selecting their opponents as well as the grounds on which to fight an enforcement action. Corporations and agencies may be sued under most statutes. At a DOE site, government contractors such as Rockwell and Westinghouse can be included as defendants. Citizens often fail in these actions by suing only one agency or company at a site, then facing dismissal when that entity "proves out" of the case during the discovery process. Thus, if only Rockwell were named as the responsible DOE contractor at Rocky Flats, an entire case could be dismissed should Rockwell answer with proof that another contractor, say EG&G, had assumed responsibility at the site during the period in question.

A citizen suit can cover multiple agencies or companies, but a careful balance must be struck. If too many defendants are named, the burden of litigation will increase. Every party must be sent copies of filings and, just as citizens can submit discovery demands on defendants, each defendant has the same number of possible discovery demands to serve on citizens. This could significantly increase the plaintiffs' litigation costs.

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Plaintiffs with a wide array of characteristics should be chosen to help guarantee that any "fault in standing" will not be a shared trait.

Choosing the Best Litigants: Another privilege of a citizen group is the selection of litigants. A citizen suit will attract media attention and the named litigants are likely to be interviewed by journalists. Government and corporate attorneys are also capable of "leaking" unfavorable facts about plaintiffs. Litigants should be chosen carefully so that they create a good representation of the community. The "lead plaintiff" will be the most sought after of the litigants since his or her name will head the caption on the case. Plaintiffs with a wide array of characteristics should be chosen to help guarantee that any "fault in standing" will not be a shared trait. Thus, plaintiffs should be people who work at, recreate near, or encounter the facility in a variety of ways. Plaintiffs who have personal or financial interests in the facility should be avoided. As will be shown below, "standing" has become a major barrier to citizen suits following recent decisions by the Supreme Court.

The Timing of Filing Suit: The filing of a citizen suit should coincide with a press conference or press release. This will increase pressure on the defendants and possibly generate more support for the cause. Citizens should avoid "dead periods" such as holidays or Fridays, and make announcements mid-week. Media attention can be increased through use of fact sheets and information packets mailed in advance. Press conferences can be held in front of a courthouse or outside facility gates. However, making a display in front of a federal court often requires a prior application and permission. Many reporters are interested in these actions but few have a working knowledge of the issues and laws. Press information should not be exaggerated. The media are likely to be responsive as long as they trust the factual assertions they receive. This trust is formed at the earliest stages and can be essential later in the case when disputes arise between the parties.

V. Litigating A Citizen Suit

Notice: All environmental statutes require notice of lawsuits. Generally, a 60-day notice must be given to any government defendant. Mandatory notice can be 90 days in some cases.

However, some statutes allow for citizens to file and serve a complaint on the government without notice. There are three advantages to this approach. First, the government can attempt to frustrate a suit by temporarily halting the violation or by claiming that it has begun enforcement.

Second, avoiding notice deprives the government of opportunities to "spin" the story in advance. The Department of Justice has sometimes mounted aggressive counter-publicity campaigns against citizen groups. Notice allows time for defendants to prepare campaigns, manage the media, and take public steps to divert attention.

Finally, notice gives violators time to destroy evidence or alter physical conditions in anticipation of a lawsuit. In contrast, once a complaint is filed the court would view any actions to destroy evidence or punish whistleblowers as serious legal violations.

Filing a Complaint: The complaint filed in a citizen suit action describes the essential factual allegations and the laws violated in the case. This is not a presentation of proof or a brief in support of the allegations. Rather, the complaint is the initial pleading that contains: 1) a short statement of the grounds for the court's jurisdiction over the matter (usually a statutory provision giving courts that jurisdiction); 2) a short statement of the facts underlying the case; and 3) a demand for relief or compensation. The complaint is filed and served on the defendants with a summons supplied by the court and completed by the citizen group. Complaints are not especially complex or difficult but a number of obstacles can lie in the path of a citizen action.

Standing: The first obstacle is a challenge to "standing." Standing is the legal term for a person's right to sue for relief in a given case. Even if a law is being violated, under the standing doctrine the courts will only allow certain people to file suit concerning that violation. To have standing, a citizen must be able to demonstrate a specific injury. Citizens are generally allowed the broadest standing when they pursue enforcement actions in which Congress essentially gives them the power to be private attorneys general. However, between the mid 1980s and the mid 1990s, the Supreme Court created

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Once a complaint is filed the court would view any actions to destroy evidence or punish whistleblowers as serious legal violations.

barriers to citizens who sue the government. The government can now move to dismiss a citizen suit by challenging the plaintiffs' standing.

The Supreme Court has long recognized that a person can be injured even if the injury is "noneconomic" or "noncompensable." Thus, in *Sierra Club v. Morton* the Supreme Court held that citizens can have so-called "user standing" based on their use or enjoyment of an area.⁵⁵ The Court, however, has rejected standing claims made solely on behalf of nature or animal life.

Conservative Supreme Court rulings will not derail a suit if citizen groups are cautious in selecting the litigants and writing their affidavits of standing.⁵⁶ The plaintiffs should be specific about their past use or enjoyment of a site and their plans to continue such use. The affidavits should not claim too large a geographic area of use, such as a state or entire region.

Current Violations: A citizen suit must allege a current rather than a past violation under most environmental statutes, and courts can dismiss allegations based entirely on past violations. For example, a citizen group sued a company for pollution discharges under the Clean Water Act in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, but the company moved to abate the problems shortly before the complaint was filed.⁵⁷ The Supreme Court ruled against the lower court and stated that past violations cannot be used as the basis for a citizen suit action. However, the Supreme Court held that citizens need only allege a good-faith basis that violations are "continuous or intermittent" at the time the suit is filed. Thus, violations may have ceased at a site but citizens can sue on a good-faith belief that these violations are intermittent and will be repeated in the future.

Plaintiffs must show that government or its contractors are "in violation" *at the time of filing*. Thus, a court may still levy a fine after abatement of the violation so long as the defendant can be shown to have been in violation when the action was filed. While this is the standard for most laws such as the Clean Water Act, some statutes such as EPCRA allow for wholly past violations. Citizens should read the "citizen suit" provision of these laws carefully before drafting complaints.

Nondiscretionary Acts: There are two types of governmental responsibilities: discretionary and nondiscretionary acts. Congress gives the executive branch many responsibilities using discretionary language, leaving the details to the agency. Citizens cannot force an agency to perform a discretionary act. However, many responsibilities are given to the government with nondiscretionary language such as "the Secretary of Energy *shall* require compliance."

Thus, the DOE must inventory all wastes at a facility and make records public under RCRA, the hazardous waste statute. There are ways to litigate regarding discretionary acts but it is difficult to prevail in such cases and they are not a good basis for a citizen suit.

In the Area 51 case, for instance, the Environmental Crimes Project focused on only one statute with clear mandatory duties in order to avoid a possible challenge at the time of filing suit. Using the hazardous waste statute, workers sued both the EPA and the military for failing to carry out inspections and inventory assessments required at a federal facility. Because the military had never acknowledged the facility, there was no formal notification or compliance with the Act.

Following filing, the Project moved to amend with other statutes and thereby "fan out" the allegations. Such a technique allowed the Project to pick the jurisdictional grounds and allegations upon which to litigate in anticipation of expected challenges from the Justice Department. This approach left no alternative for the court but to grant summary judgment on the original claims against the EPA.

Maximizing Counts: The number of allegations against the defendant in a citizen suit should be maximized either at the time of filing or within the period allowed for amending the complaint, usually 60 days. A court will allow amendment of a complaint after filing, including the addition of new parties. However, once the period for amending a complaint has elapsed, good cause must be shown for any further amendments. This gives the court a great deal of discretion and since many federal judges are conservative regarding environmental cases and citizen suits, amendment might not be permitted.

Relief: The types of relief that can be requested depend on the environmental statute in question, but the same basic components are present in most of the laws.

First, citizens should ask for enforcement of the relevant laws and for an order of compliance.

Second, citizens should ask that daily fines be imposed if possible. If fines are awarded, they will usually go to the United States Treasury rather than to the citizens, but a financial penalty demonstrates the seriousness of the violations and functions as an incentive to comply.

Third, citizens can ask for injunctions to block current and future misconduct. An injunction beyond an order of compliance is rarely granted, but if the violations were clearly known to the government, a court can issue an injunction on operations to further control the agency.

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In federal court, the parties are required to attempt to resolve the matter in dispute before going to trial.

Fourth, citizens should seek a "declaratory judgment," a public finding by the court of unlawful conduct. Attorneys for the defendants usually resist this demand in order to avoid embarrassment to their clients. However, if this request is not made, a court will often simply order compliance and avoid publicly finding against the violator on specific violations.

Fifth, citizens should *always* demand reimbursement from the defendants for fees and costs. If they prevail, citizens are entitled to such compensation, which can exceed fines and penalties. Citizens should also include a request for "all other appropriate relief" or "all other relief deemed appropriate by the court." This last item allows damages to be included that were uncovered during the litigation.

Settlement Negotiations: Negotiation follows filing the complaint and receiving the government's answer. In federal court, the parties are required to attempt to resolve the matter in dispute before going to trial. This stage can become an opportunity for its attorneys to promise a "good faith effort" or "every reasonable effort" by the government to meet its legal responsibilities, without enforcement or a solid commitment. A proposal offered during negotiation is often simply a restatement of duties that are already required by law.

Citizens should not allow the government to take the lead in negotiations, but should instead draft their own agreement in the form of a "consent decree" between the parties and the court. Even the most conservative judges will not stand for the breach of an agreement made in court. Citizens should note that there is no additional burden imposed on the government if the government truly intends to use every reasonable effort to comply. If the government balks at a consent decree that requires it to carry out essentially the same actions described as a good-faith effort, the case should proceed to litigation.

Discovery: If negotiations are unsuccessful, the parties will probably have a hearing before a judge or magistrate to report that no negotiated settlement is possible. At this time a trial schedule will be set. It is often in the citizens' interest to ask for the longest possible period of discovery before trial, during which answers can be requested from the government. Any false statements or holding back of information can be penalized. The DOE and the DOD are notorious for discovery violations and abuses, and the courts have repeatedly criticized the Justice Department for such practices. It is important to have as much time as possible to assemble incriminating information from government files. Usually the initial time limit for discovery is 180 days, but this period can often be extended.

In addition to oral questioning of witnesses in "depositions," discovery allows three basic types of written demands that can be made of the government. First, each party usually has 40 "interrogatories." A typical interrogatory is "Name all persons with responsibilities over the waste stream at Unit 222 and describe those responsibilities." The government is obligated to respond fully and to make all reasonable investigations into the matter. Moreover, the government must update these answers or correct them immediately when new information is discovered.

Interrogatories should be carefully written in order to avoid easy denials. An interrogatory asking for "all records of DOE employees" might receive an answer excluding contractor employees, who usually constitute the vast majority of workers at any DOE site. A definition section in the interrogatory can help by broadly defining the word "employee." Redundant interrogatories should be avoided. The allocated 40 questions can be used quickly in litigation. Some of the permitted interrogatories should be kept in reserve for following up on revealed information.

The second form of discovery is a "request for production of documents." The number of these requests may also be restricted by the court. A request for documents is straightforward and should follow drafting rules similar to those used for interrogatories.

The final form of discovery is a "request for admission." This is not a question but a statement. A party receiving an admission request will be asked to "confirm or deny" a statement. For example, a citizen may want to ask the government to admit or deny that "no soil sampling was taken from Unit 222 between 1980 and 1995 pursuant to the Resource Conservation and Recovery Act." Parties usually are not restricted in the number of admissions requests but in cases of overuse the court might impose limits.

The government commonly refuses to answer discovery requests, arguing "vagueness" or "overbreadth" or "confidentiality." Citizens must be persistent. Attempts at evasion are common in DOE and DOD cases, where secrecy claims can be added to the usual methods for resisting discovery.

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The government is obligated to respond fully to citizens' interrogatories.

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*Most citizen
 environmental
 suits are won*

*or lost in
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Motions: Most citizen environmental suits are won or lost in "motions practice." Trials are usually not held in these actions because, by the end of discovery, the fact of violations is usually clear. Thus, one party will normally move for a summary judgment before trial. Motions to compel the government to provide evidence should be made before this final resolution. Otherwise, if the court orders discovery, plaintiffs will not have the opportunity to follow up with additional questions except with permission from the court. The first motion to compel should be a clear and discrete "test" motion on a discovery demand. Once a court criticizes the government, further failures will be treated harshly and can allow citizens to move for sanctions to modify the behavior of the defendants.

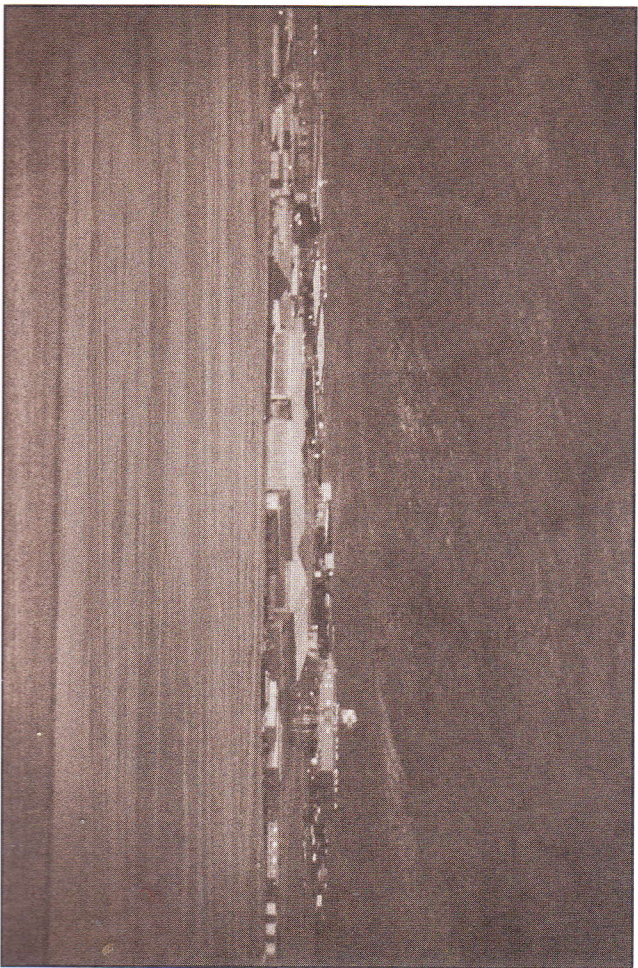
Another important motion used in citizen suits is a motion for protective order. If some of the plaintiffs or sources are whistleblowers, a motion can be filed to protect their identities. In some cases, an order may be obtained to use anonymous names such as "John Doe" for parties under threat of retaliation by the government or its contractors. This option, however, requires strong evidence and is rarely approved by the Court.

Judgment: A final judgment may come as a result of the summary judgment motion or a final ruling. Either way, the loser of the case is likely to seek review of the judgment by the trial judge as part of a Motion for Reconsideration. In some important issues, a party can go to the Court of Appeals to challenge a decision. Thus, if a discovery motion is denied and would effectively cripple the citizens' case, they would normally first ask the Court to reconsider its motion. If that request is denied, citizens can ask for permission to go to the Court of Appeals.

With the exception of important pretrial motions, parties wait for a final ruling before taking the issue to an appellate court. When a Court rules in favor of citizens, their attorney will often have only 30 days to demand compensation for fees and costs. At this point, the government has lost the case and it has little to lose from taking openly hostile positions in court. Fights over fees can be ugly but should be endured. Fees and costs are important elements of the enforcement system. Accepting inadequate fees will only undermine future citizens suits with similar claims.

Trial: This document does not attempt to cover trials. Citizen suit actions rarely lead to a trial. Most actions are either proven or defeated by summary judgment. Trial issues are numerous and esoteric, so that no general advice would apply to a majority of cases. A comprehensive trial section would require a much longer text than can be accommodated by this document. In case a citizen action does go to trial, the attorneys involved in the earlier phases of the case should be able to direct citizens to appropriate sources of information and assistance.

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Mark Farmer Photo

VI. Anticipating Government Attacks

Procedural Challenges

Most citizen environmental suits against the DOD, DOE and other government agencies have similar points of vulnerability and opportunity.

Standing: The government typically challenges the standing of plaintiffs. As described in the section “Choosing the Best Litigants,” these challenges can be overcome through the use of multiple plaintiffs with different standing claims ranging from people who recreate or live near a site, work at the site, or previously worked there. It is a good idea to have at least three plaintiffs from each category.

Notice: Another favorite procedural attack is to exploit the notice period. Adequate notice should be given except when using statutes such as RCRA that allow filing without notice for some violations. It is always an advantage to proceed without notice if possible because the government will then have less time to begin “paper” enforcement efforts with little purpose other than to delay a filing.

Statute of Limitations: In many state citizen suits, courts can dismiss actions based on a statute of limitations challenge. If an action is filed too many years after the violation occurred then it might encounter a statute of limitations problem. State statutes of limitation can render information unusable as evidence in as little as two years. The normal statute of limitations for commencing an action in the federal system is five years. For federal actions, this is not usually a decisive issue because lawsuits must be based on current, or at least intermittent, violations.

Initiated Enforcement: The favorite and most successful challenge by the government in environmental cases is an assertion that the EPA or its state counterpart has begun a compliance effort or prosecution in the case. Since citizen suit actions are alternative methods of enforcement, once the government begins to enforce, the citizen suit is generally delayed or dismissed by the court. Government attorneys, therefore, will quickly create arguments of “enforcement after notice” to block the lawsuit.

Ripeness/Exhaustion: In some cases, the government will present ripeness or exhaustion challenges. Ripeness arguments are based on the constitutional requirement that any case in federal court represents a true “case or controversy.” Thus, courts will dismiss a complaint if the controversy is not “ripe” for adjudication. When the government refers to this doctrine and suggests a longer period for possible agency action, citizens should not take the bait. If the agency is violating federal law, enforcement is always ripe.

In a similar fashion, there is no need for citizens to “exhaust” administrative remedies before filing a citizen enforcement action because there is no administrative remedy for petitioning an agency to stop violating the law. These types of doctrines are often discussed in negotiations or alluded to in early conversations with citizens. In most cases, the use of these doctrines in citizen suits by the government is frivolous and should be ignored.

Post-Filing Challenges

In litigating against the government, citizen groups have historically run into legal barriers used by the government to protect itself and its contractors. Citizens have often been successful despite these barriers. Once evidence is uncovered, the Justice Department frequently claims sovereign immunity in order to bar legal actions. Sometimes, when sovereign immunity cannot be used, the government can intervene in an action by invoking the Military and State Secrets Privilege. This privilege can effectively gut a case at trial by removing all of the evidence acquired against the defendant.

Sovereign Immunity: This doctrine blocks full application against the government of three (Clean Air Act, Clean Water Act, and CERCLA) of the four major federal pollution control laws. Under all of the major federal environmental statutes, both civil and criminal sanctions may be brought against “persons” who violate their provisions. Under virtually all statutes, the term “person” applies to individuals, corporations, and state or local governments. Yet despite the apparent clarity of statutory language, sovereign immunity prevents the effective enforcement of environmental laws against the government and its employees, agents, or contractors.

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The Military and State Secrets Privilege can effectively gut a case at trial by removing all of the evidence acquired against the defendant.

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Sovereign immunity continues to limit the ability to levy fines or penalties against the government in most environmental actions.

Sovereign immunity is a legal concept, originally from England, that protects the government from lawsuit. This doctrine, however, can be waived by Congress. Courts require any waiver of sovereign immunity to be very specific, or they can find that no waiver has occurred. As noted above, all four major pollution control laws contain language that specifically requires federal agency compliance. Accordingly, sovereign immunity does not limit citizen suits that ask for declaratory or injunctive relief. However, citizens should be aware that special statutory immunity provisions apply to some DOE activities. The DOD can also claim national security exemptions under some of the statutes, although often a presidential exemption is required.

Sovereign immunity continues to limit the ability to levy fines or penalties against the government in most environmental actions. In response to a 1992 Supreme Court case that held that the government still possesses sovereign immunity with regard to penalties under environmental statutes, Congress passed the Federal Facilities Compliance Act, which made all federal agencies subject to the Resource Conservation and Recovery Act/the federal hazardous waste law. Under the Superfund, Clean Water Act, or Clean Air Act, however, sovereign immunity still protects the government from punitive damage penalties.

Military and State Secrets Privilege: It is improper for the Justice Department to invoke national security for a tactical or strategic purpose in litigation, yet citizen groups and attorneys have repeatedly encountered exaggerated secrecy claims by the government. Although some judges have resisted the overuse of secrecy, most appear unwilling to enter disputes with the executive branch over legitimate secrets versus improperly withheld data.

Once violations are detected, the Justice Department often invokes the military and states secrets privilege to prevent the evidence from being used against the government. Privileged information is generally allowed for valid public purposes. For example, a confessor's statement to his minister is protected from forced disclosure. Thus, barring the disclosure of information can result in valid cases being dismissed for lack of evidence. Such an outcome, it has been determined, is acceptable when compared to the damage that would result if the privileges were not allowed to exist.

In the state secrets context, the privilege is allowed to prevent actions from being litigated because, it is argued, the need for secrecy outweighs the need for justice. In the civil arena, use of the privilege can result in the outright dismissal of a case no matter how compelling the plaintiff's claims against the government. Moreover, since civil suits often serve as the source for evidence used in criminal cases, the government's use of secrecy can impede criminal cases.

In the Area 51 case, the military has used executive privilege in an unprecedented fashion in its attempts to kill the citizen suit. In formal papers, the military claims that it can use a national security privilege to withhold evidence of crime, a position rejected earlier by the Nixon and Reagan administrations. However, the excessive use of information classification sometimes works to the advantage of citizens, who can now bring this purely legal question to the higher courts. Exposure of excessive secrecy has led to congressional and public outcry against the Clinton Administration's use of executive privilege in the Area 51 case, as well as a possible redefinition governing the use of executive privilege in future cases.

There are ways to prevent critical secrets from being disclosed to hostile interests while still allowing the case to proceed. Sealed court hearings, restrictions on public disclosure of information, production of evidence in summarized form, and limited admissions of evidence are all methods by which cases can proceed without threatening valid security interests.⁷⁵⁸

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Citizens must take initiatives if they are to protect themselves and send clear messages to large public and private bureaucracies.

VII. Conclusion

President Dwight Eisenhower once observed that the most difficult part of defending a country "is how far you can go without destroying from within what you are trying to defend from without."⁵⁹ The history of environmental violations by the federal government is a tragic example of this problem. Charged with developing and testing weapons, the Defense and Energy departments historically have ignored the environmental damage done to the citizens and environment that they were defending.

The Department of Justice has been reluctant to launch prosecutions against other federal departments. Without independent monitoring, government officials and contractors knowingly exposed their workers and neighbors to health dangers and environmental contamination that will require decades to comprehend, not to mention clean up. In the absence of government action against its own contractors and agencies, the most powerful deterrent is an educated and active citizenry. This report seeks to take a step in that direction by outlining how groups of concerned citizens can become "private attorneys general," who take action on environmental crime when the government fails to carry out its responsibilities. Unfortunately, citizens are sometimes taught to defer to professionals who have "expert" credentials. People often believe that they cannot make a difference, or that if they do act they will make mistakes, waste their efforts, or even be sued as a result.

This report and guide are intended to counter that attitude. Citizens must take initiatives if they are to protect themselves and send clear messages to large public and private bureaucracies. This does not mean they must proceed alone, without expert advice. We urge citizens to seek and use professional assistance. Public interest groups, however, must take the first steps and demonstrate to the available professionals that there is a reasonable basis for concern about an issue and that citizen organizations are committed to resolving it.

Citizen groups prepared to take up strong advocacy are urged to study this guide as well as the public and not-so-public documents related to the problems they face.

For clarification or further information about procedures contained in this report, please contact:

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ENDNOTES

- 1 *Facing Reality: The Future of the U.S. Nuclear Weapons Complex*. Citizen's Guide to the Future of the U.S. Nuclear Weapons Complex, *Beyond of the Bomb: Disarming Nuclear Weapons and Disposing of Their Radioactive Wastes*; Nuclear Weapons "Cleanup;" Prospect Without Precedent; Official Use Only: Ending the Culture of Secrecy in the U.S. Nuclear Weapons Complex. For copies of reports produced as part of the *Facing Reality* series, contact The Tides Center, P.O. Box 29907, San Francisco, CA 94129.
- 2 *The U.S. Military's Toxic Legacy*, Military Toxics Project, National Toxic Campaign Fund, Boston, MA, 1991.
- 3 H.R. Rep. No. 111, 102d Cong., 1st Sess., 2 (1991) cites government investigations and concludes that "Federal facilities present some of the very worst [hazardous waste] compliance problems."
- 4 *Id.*
- 5 United States v. Dee, 912 F.2d 741 (4th Cir. 1990).
- 6 Statement of Ms. Sherri Goodman, Deputy Undersecretary of Defense, before the Senate Appropriations Committee Subcommittee on Defense Environmental Security Programs, May 17, 1994.
- 7 *Id.* See also S. Rep. No. 67, 102 Cong., 1st Sess. 3 (1991).
- 8 Aimée Houghton and Lenny Siegel, *Military Contamination and Cleanup: Atlas for the United States-1995*, Pacific Studies Center, 1995.
- 9 Statement of Admiral James D. Watkins, Secretary of Energy, before the Senate Committee on Energy and Natural Resources, October 5, 1989 that "[c]ompliance problems have resulted from a 40-year culture cloaked in secrecy . . . without a real sensitivity for protecting the environment."
- 10 U.S. Congress, Office of Technology Assessment, *Complex Cleanup: The Environmental Legacy of Nuclear Weapons Production*, OTA-484 (Washington, DC U.S. Government Printing Office, February 1991).
- 11 Many books and reports describe the production of hazardous and radioactive wastes by the Department of Energy, in addition to *Complex Cleanup* and the *Facing Reality* series. For example, see *Nuclear Facility Cleanup*, U.S. General Accounting Office, (GAO-RCED-9-118 May 1995); *Long-Lived Legacy: Managing High-Level and Transuranic Waste at the DOE Nuclear Weapons Complex*, U.S. Congress, Office of Technology Assessment, (OTA-BP-O-83 Washington, DC: U.S. Government Printing Office, May 1991).
- 12 In *Nuclear Facility Cleanup*, the General Accounting Office advised Congress that a cleanup of DOE sites "will cost at least \$300 billion (and perhaps as much as \$1 trillion) and take more than 30 years to complete." The DOE's analysis, the 1995 Baseline Environmental Management Report, estimates a cost of about \$230 billion.
- 13 *Complex Cleanup*, p. 4.
- 14 Hearings held primarily in the House under two independent oversight committees: House Oversight Subcommittee of the Energy and Commerce Committee and House Oversight Subcommittee for the House Space and Technology Committee. A report documenting lack of prosecution by the Department of Justice was produced by the Environmental Crimes Project, George Washington University: *Preliminary Report to Congress: Environmental Criminal Enforcement*, 1992, for Chairman of the House Subcommittee of Crime and Criminal Justice of the Judiciary Committee.
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- 16 Eric Schine, "Rockwell: Explosive Woes," *Business Week*, Aug. 21, 1995, at 71; see also "Rockwell Agrees to Pay \$18.5 Million To Settle Waste Charges at Rocky Flats," 22 *Daily Environment Report*, (Bureau of National Affairs) No. 49, p. 2661, Apr. 3, 1992.
- 17 *Ibid.*
- 18 Staff of House Comm. on Science, Space, and Technology, Subcommittee on Investigations and Oversight, 103d Cong., 1st Sess., Report on Environmental Crimes at the Rocky Flats Nuclear Weapons Facility (ISBN 0-16-041675-2).
- 19 Sharon Benslein and Myron Levin, "Lab Detonated Wastes For Years, Records Show," *Los Angeles Times*, July 31, 1995, p. A1.
- 20 *Ibid.*
- 21 George Lobenz, "Union Sues Operator of DOE's Mound Plant," 23 *Energy Daily* No. 157, p. 1, August 18, 1995.
- 22 "Tury Finds 15 Failed to Provide Adequate Health Warning to Workers," 195 *Daily Environment Report*, No. 127, July 3, 1995.
- 23 Jonathan Tutley, "Free the Rocky Flats 23," *The Washington Post* (op-ed, August 11, 1993). The Grand Jurors, represented by Mr. Tutley, have asked for immunity to testify before Congress.
- 24 House Science and Technology Committee, Oversight Subcommittee, *Rocky Flats Investigation*, 1993.
- 25 Free the Rocky Flats 23.
- 26 *Rocky Flats Investigation*.
- 27 Benny Morson, "Rockwell Asks Narsch to Block New Flats Suit," *Rocky Mountain News* (December 23, 1995).
- 28 *Rocky Flats Investigation*.
- 29 Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993).
- 30 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (1988 & Supp. 1993).
- 31 Endangered Species Act of 1973, 16 U.S.C. § 1540(e) (1988).
- 32 Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (1988).
- 33 Toxic Substances Control Act, 15 U.S.C. § 2619 (Supp. V 1993).
- 34 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9659 (1988).
- 35 18 U.S.C. § 1962 *et seq.* (1970).
- 36 42 U.S.C.A. §§ 4321 to 4370d.
- 37 EPCRA is a useful basis for suing corporations, because the law is geared to the disclosure of information on discharges, accidents, and dangerous conditions in the transport and handling of hazardous wastes.
- 38 Pub. L. No. 102-386, 106 Stat. 1505 (1992) (codified at 42 U.S.C. 6939c, 6961 (1988 & Supp. IV 1992)).
- 39 H.R. Rep. No. 111, 102d Cong., 1st Sess., 2 (1991) quotes President George Bush: "[u]nfortunately, some of the worst offenders are our own federal facilities . . . The government should live within the laws it imposes on others."
- 40 Provisions are found in the Act to Prevent Pollution From Ships; the Deep Water Port Act; the Deep Seabed Hard Mineral Resources Act; the Energy Policy and Conservation Act; Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping Act); the Natural Gas Pipeline Safety Act; the Noise Control Act; the Ocean Thermal Energy Conservation Act; the Outer Continental Shelf Lands Act; and the Power Plant and Industrial Fuel Use Act; Safe Drinking Water Act; and Surface Mining Control and Reclamation Act.
- 41 *Sierra Club v. United States Department of Energy*, 1991 U.S. Dist. LEXIS 18102, 22 ELR 20076 (D. Colo. 1991).
- 42 42 U.S.C. § 9603(b).
- 43 42 U.S.C. § 9603(d)(2).
- 44 42 U.S.C. § 9603(c).
- 45 The "reasonable person" standard governs such cases. People can sometimes be held criminally liable for simply committing an act prohibited under an environmental law. The Refuse Act contains the only such provision under federal law, and holds defendants criminally liable for releasing foreign substances into navigable waters.
- 46 Jack Cheevers, "Toxic Legacy, Cleanup at Edwards Lags 5 years After Its Placement on Priority List," *Los Angeles Times* p. 1, August 7, 1995.
- 47 Martin Calhoun, "Cleaning Up the Military's Toxic Legacy," 124 *USA Today* magazine p. 60 (1995).

- 48 47 F.3d 325 (9th Cir. 1995).
- 49 774 F. Supp. 317 (D.N.J. 1991).
- 50 42 U.S.C. § 7413(f).
- 51 U.S. Environmental Protection Agency, *EPA Enforcement Manual* (1995)
- 52 Citizens are allowed to participate in public comment periods on subjects ranging from new permits to new regulations. The Federal Register is available on the Internet (help@eids05.gpo.gov) or by fax (202-512-1262) for a fee. Another source of information is the Code of Federal Regulations (CFR). When regulations are changed, they first appear in the Federal Register and after a public comment period they become part of the Code.
- 53 *A 12-Step Approach to Obtaining Records from Federal Agencies Using FOIA*, The First Amendment Project, Oakland, CA.
- 54 Nine types of exception to FOIA can be invoked during larger inquiries, particularly regarding DOE and DOD facilities. The government may withhold FOIA information if the information is: 1) considered classified or sensitive under an Executive Order; 2) related solely to an internal personnel rule or practice; 3) specifically exempted from disclosure by a statute; 4) a trade or commercial secret obtained from a private party by the government; 5) an inter-agency or intra-agency communication; 6) a personnel or medical file that is covered by privacy rules; 7) information compiled for law enforcement purposes, where the disclosure would interfere with enforcement proceedings or reveal confidential techniques or information; 8) information relating to the regulation or supervision of a financial institution; or 9) geological or geophysical information or data. The exceptions used most often by the DOE are numbers 1, 5, and 6. The government may also claim common law privileges such as the attorney-client privilege or executive privilege in its responses.
- 55 *Sierra Club v. Morton*, 405 U.S. 727 (1972).
- 56 In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), Justice Antonin Scalia delivered a hard blow to citizens in environmental cases. While the statute (the Endangered Species Act) has a citizen suit provision, Scalia and a plurality on the Court rejected standing by *Sierra Club* members based on their failure to show a "discrete injury." While not rejecting "user standing" as a basis for such suits, Scalia rejected an affidavit supporting standing that stated an intention to use or return to the area. The lack of specificity in the affidavit and "concreteness" of the injury were cited by the Court.
- 57 484 U.S. 49 (1987).
- 58 The counterpart to the privilege in criminal actions is codified in the Classified Information Procedures Act (CIPA). This Act provides a comprehensive scheme under which criminal trials involving classified information are conducted. CIPA's main flaw is that under it the government can ask the court to allow classified information to be described or summarized rather than fully disclosed. If the court denies the government's request and orders full disclosure, the government can unilaterally reverse the court's decision. Once the court's decision is reversed, the court can require the entire case or some of the charges to be dropped against the Defendant.
- 59 "Cleaning Up the Military's Toxic Legacy,"

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